

**REMARKS**

The subject application includes pending claims 362-425. An Office Communication dated October 8, 2008 indicated that the Applicant's previous response filed on September 8, 2008 was not fully responsive to the prior Office Action because:

"The reply must present arguments pointing out specific distinctions believed to render the newly presented claims patentable over any applied references".  
37 CFR §1.111.

Following are comments that support the patentability of pending claims 362-425 over each of the previously applied references. The Applicant notes that three references have been applied against the claims in previous Office Actions, including U.S. Patent No. 6,371,988 to Pafford et al. (hereafter "the '988 patent"), U.S. Patent No. 6,258,125 to Paul et al. (hereafter "the '125 patent"), and U.S. Patent No. 6,530,955 to Boyle et al. (hereafter "the '955 patent").

With regard to the '125 and '955 patents, the Applicant submits that neither of these references qualify as prior art to the subject application for at least the following reasons. Specifically, the Applicant notes the following:

- (1) the '125 patent was filed on July 30, 1999 and claims priority to a provisional patent application file August 3, 1998;
- (2) the '955 patent was filed on May 18, 2001 and is a divisional of a patent application filed June 8, 1999; and
- (3) the present application is a continuation application that claims priority to a string of prior patent applications in a line of cases extending back to a parent application filed June 3, 1997 (U.S. Patent Application Serial No. 08/867,963).

The Applicant submits that the claims pending in the present application are entitled to an effective filing date at least as early as June 3, 1997 for purposes of determining qualification of references as prior art. Notably, neither the '125 patent nor the provisional patent application to which it claims priority was filed before June 3, 1997. Accordingly, the '125 patent does not qualify as prior art to the present application under 35 U.S.C. § 102(e) or under any other section of 35 U.S.C. § 102. Similarly, neither the '955 patent nor the prior patent application to

which it claims priority was filed before June 3, 1997. Accordingly, the '955 patent likewise does not qualify as prior art to the present application under 35 U.S.C. § 102(e) or under any other section of 35 U.S.C. § 102. Since the '125 and '955 patents do not qualify as prior art to pending claims 362-425, the Applicant submits that pending claims 362-425 are patentable over each of these previously applied references.

With regard to the '988 patent, the Applicant submits that pending independent claims 362, 385 and 405 recite features that are neither disclosed nor suggested by the '988 patent, and are therefore patentable over the '988 patent.

Independent claim 362 recites, among other elements and features, a spacer body formed of bone and including an insertion end and an opposite tool engagement end each comprising a flattened end surface, the spacer body including upper and lower vertebral engaging surfaces that are flattened from the insertion end to the tool engagement end to define the spacer height, the vertebral engaging surfaces including surface features defined along the spacer length that are structured to facilitate engagement with the adjacent vertebrae to inhibit movement of the spacer body within the intervertebral space, the spacer body defining a chamber extending therethrough and opening onto the vertebral engaging surfaces.

With regard to the spacer embodiments illustrated in Figures 3-8 and 47-49, none include "upper and lower vertebral engaging surfaces that are flattened from said insertion end to said tool engagement end to define said spacer height", but instead comprise dowels having a circular outer cross. With regard to the spacer embodiments illustrated in Figures 29-36 and 40-42, none include "an insertion end and an opposite tool engagement . . . each comprising a flattened end surface". To the contrary, the anterior end surface is convexly curved, and therefore does not comprise a flattened end surface. For at least these reasons, independent claim 362 is submitted to be patentable over the '988 patent. Dependent claims 363-384 depend from independent claim 362 and are patentable for at least the reasons supporting the patentability of independent claim 362.

Independent claim 385 recites, among other elements and features, a spacer body formed of bone and including an insertion end that is chamfered to facilitate insertion of the

spacer body into a space between adjacent vertebrae, and an opposite tool engagement end including a slotted groove extending across the spacer width, the spacer body also including upper and lower vertebral engaging surfaces that are flattened from the insertion end to the tool engagement end to define the spacer height, and the vertebral engaging surfaces include surface features defined along the spacer length and structured to facilitate engagement with the adjacent vertebrae to inhibit movement of the spacer body within the intervertebral space, and the spacer body defining a chamber extending therethrough and opening onto the vertebral engaging surfaces.

With regard to the spacer embodiments illustrated in Figures 3-8 and 47-49, none include "upper and lower vertebral engaging surfaces that are flattened from said insertion end to said tool engagement end to define said spacer height", but instead comprise dowels having a circular outer cross. With regard to the spacer embodiments illustrated in Figures 29-36 and 40-42, none include a tool engagement end including "a slotted groove extending across said spacer width". For at least these reasons, independent claim 385 is submitted to be patentable over the '988 patent. Dependent claims 386-404 depend from independent claim 385 and are patentable for at least the reasons supporting the patentability of independent claim 385.

Independent claim 405 recites, among other elements and features, a spacer body formed of bone and including an insertion end and an opposite tool engagement end, the spacer body also including upper and lower vertebral engaging surfaces that are flattened from the insertion end to the tool engagement end to define the spacer height, and the vertebral engaging surfaces include surface features defined along the spacer length and structured to facilitate engagement with the adjacent vertebrae to inhibit movement of the spacer body within the intervertebral space, with the surface features comprising teeth extending across the spacer width and including a flat crest surface extending between a leading flank surface and an opposite trailing flank surface, and the spacer body defining a chamber extending therethrough and opening onto said vertebral engaging surfaces.

With regard to the spacer embodiments illustrated in Figures 3-8 and 47-49, none include "upper and lower vertebral engaging surfaces that are flattened from said insertion

end to said tool engagement end to define said spacer height”, but instead comprise dowels having a circular outer cross. With regard to the spacer embodiments illustrated in Figures 29-36 and 40-42, none include vertebral engaging surfaces including surface features “comprising teeth extending across said spacer width and including a flat crest surface extending between a leading flank surface and an opposite trailing flank surface”. Instead, the teeth 205 and the blades 212 define pointed tips or cutting edges. For at least these reasons, independent claim 405 is submitted to be patentable over the ‘988 patent. Dependent claims 406-425 depend from independent claim 405 and are patentable for at least the reasons supporting the patentability of independent claim 405.

**CONCLUSION**

In view of the foregoing remarks, it is respectfully submitted that Applicant's application is now in condition for allowance with pending claims 362-425.

Reconsideration of the subject application is respectfully requested. Timely action towards a Notice of Allowability is hereby solicited. The Examiner is encouraged to contact the undersigned by telephone to resolve any outstanding matters concerning the subject application.

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